

1 ANISHA DASGUPTA, General Counsel  
2 MILES D. FREEMAN, Cal. Bar No. 299302  
3 mfreeman@ftc.gov  
4 KARINA A. LAYUGAN, Cal. Bar No. 302049  
5 klayugan@ftc.gov  
6 CARLA L. CHEUNG, Cal. Bar No. 291562  
7 cccheung1@ftc.gov  
8 Federal Trade Commission  
9 10990 Wilshire Boulevard, Suite 400  
10 Los Angeles, CA 90024  
11 Tel: (310) 824-4300  
12 Fax: (310) 824-4380

13 *Attorneys for Plaintiff Federal Trade Commission*

14 *[additional counsel appear on next page]*

15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

17 FEDERAL TRADE COMMISSION, *et*  
18 *al.*,

19 Plaintiffs,

20 v.

21 GREEN EQUITABLE SOLUTIONS,  
22 *et al.*,

23 Defendants.

Case No. 2:22-cv-6499-FLA-MARx

**PLAINTIFFS' NOTICE OF  
MOTION AND MOTION TO  
STRIKE DEFENDANT ROGER  
SCOTT DYER'S AFFIRMATIVE  
DEFENSES AND CROSSCLAIM**

*[Declaration of Taylor Steinbacher  
filed concurrently herewith]*

**Hearing Date:** February 24, 2023

**Time:** 1:30 PM

**Place:** Courtroom 6B

1 CLOTHILDE V. HEWLETT, Commissioner  
2 MARY ANN SMITH, Deputy Commissioner  
3 SEAN M. ROONEY, Assistant Chief Counsel  
4 TAYLOR STEINBACHER, Cal. Bar No. 285335  
5 Taylor.Steinbacher@dfpi.ca.gov  
6 LOUIS LAVERONE, Cal. Bar No. 296990  
7 Louis.Laverone@dfpi.ca.gov  
8 Department of Financial Protection and Innovation  
9 320 West 4th Street, Suite 750  
10 Los Angeles, California 90013  
11 Telephone: (213) 576-7500  
12 Facsimile: (213) 576-7181  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Attorneys for Plaintiff California Department of  
Financial Protection and Innovation*

**NOTICE OF MOTION**

**TO THE COURT, ALL PARTIES, AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Plaintiffs Federal Trade Commission and the California Department of Financial Protection and Innovation (collectively, “Plaintiffs”), pursuant to Federal Rule of Civil Procedure 12(f), respectfully move this Court for an Order striking affirmative defenses numbered 1-2, 4-12, and 14 and a crossclaim from the Answer of Defendant Roger Scott Dyer (“Dyer”).

As set forth herein, Dyer, through counsel, filed an Answer to Plaintiff’s First Amended Complaint (“FAC”) on November 21, 2022. (Dkt. 63.) Plaintiffs met and conferred with Dyer’s counsel regarding the potential for filing the instant motion. As a result of the parties’ meet and confer efforts, counsel for Dyer agreed to seek leave to file an Amended Answer withdrawing certain affirmative defenses and the crossclaim and, once granted, to file Dyer’s Amended Answer. (Declaration of Taylor Steinbacher (“Steinbacher Decl.”), ¶¶ 3-5.) Counsel for Dyer submitted a stipulation to the Court seeking such leave to file an Amended Answer. (Dkt. 80.) However, on December 16, 2022, before the Amended Answer was filed, Dyer’s counsel moved to withdraw; the Court granted that motion on December 21, 2022. (Dkts. 86, 95.)

Also on December 21, 2022, the Court set a deadline of January 9, 2023, for Dyer, now appearing *pro se*, to file an Amended Answer. (Dkt. 97.) That date has now passed, and Dyer has not filed an Amended Answer—the affirmative defenses and crossclaim in Dyer’s original answer still appear to be operative and are subject to strike.

This motion is made following the conference of Plaintiff’s counsel and Dyer’s counsel, pursuant to Local Rule 7-3, on December 1 and 5, 2022. After Dyer began to represent himself in this matter *pro se*, Plaintiffs’ counsel attempted to contact Dyer to discuss matters relating to this case, including the issues

surrounding this motion, several times by telephone and e-mail between December 21, 2022 and January 18, 2022, but he has not responded. (Steinbacher Decl., ¶¶ 4-6, 12-13, 15-18.) Plaintiffs e-mailed Dyer to continue the meet and confer process that began with his previous counsel about the filing of the instant motion on January 13, 2023. (*Id.*, ¶ 15.) Plaintiffs have allowed seven days to pass with no response from Dyer before filing the instant motion.

Dated: January 20, 2023

Respectfully submitted,

/s/ Karina A. Layugan

MILES D. FREEMAN

mfreeman@ftc.gov

KARINA A. LAYUGAN

klayugan@ftc.gov

CARLA L. CHEUNG

ccheung1@ftc.gov

Federal Trade Commission

10990 Wilshire Boulevard, Suite 400

Los Angeles, CA 90024

Tel: (310) 824-4300

Fax: (310) 824-4380

*Attorneys for Plaintiff Federal Trade  
Commission*

/s/ Taylor Steinbacher

TAYLOR STEINBACHER

Taylor.Steinbacher@dfpi.ca.gov

LOUIS LAVERONE

Louis.Laverone@dfpi.ca.gov

California Department of Financial

Protection & Innovation

320 West 4th Street, Suite 750

Los Angeles, CA 90013

Tel: (213) 576-7500

Fax: (213) 576-7181

*Attorneys for Plaintiff California  
Department of Financial Protection &  
Innovation*

## **TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	FACTUAL BACKGROUND.....	2
III.	PROCEDURAL HISTORY .....	2
IV.	LEGAL STANDARD.....	4
V.	ARGUMENT .....	4
A.	Dyer’s Affirmative Defenses Nos. 1-2, 4-12, And 14 Are Inappropriate And Inapplicable .....	4
1.	Affirmative Defenses Nos. 4, 8, And 14 Are Generally Unavailable In Government Civil Enforcement Actions .....	5
2.	Affirmative Defense No. 6 Does Not Meet The Heightened Pleading Requirements And Is Not Available In Government Civil Enforcement Actions .....	6
3.	Affirmative Defenses Nos. 1-2 Are Grounded In Tort And This Is Not A Tort Case .....	6
4.	Affirmative Defenses Nos. 5, 7, 9-10, And 12 Are Grounded In Contract And This Is Not A Contract Case .....	7
5.	Affirmative Defense No. 11 Must Be Stricken Because No Applicable Judgments Exist .....	8
B.	Dyer’s Affirmative Defenses Nos. 1-2, 4-12, and 14 Are Also Subject To Strike As Inadequately Pled.....	9
C.	Dyer’s Crossclaim For Equitable Indemnification Against His Co- Defendant Nabati Is Inappropriate Here.....	9
VI.	CONCLUSION.....	11

## TABLE OF AUTHORITIES

### **Federal Cases**

*Allen v. McCurry*

449 U.S. 90 (1980).....10

*California ex rel. State Lands Com. v. United States*

512 F. Supp. 36 (N.D. Cal. 1981).....4

*CFPB v. Nationwide Biweekly Admin., Inc.*

No. 15-CV-02106, 2016 WL 2961868 .....4

*FDIC v. Butcher*

660 F. Supp. 1274 (E.D. Tenn. 1987).....4

*FTC v. Adept Mgmt., Inc.*

2017 WL 1055959 (D. Or. Mar. 20, 2017).....12

*FTC v. Am. Evoice, Ltd.*

2016 WL 7165904 (D. Mont. Aug. 9, 2016).....7, 13

*FTC v. Com. Planet, Inc.*

2010 WL 11673795 (C.D. Cal. July 6, 2010).....6

*FTC v. Elec. Payment Sols. of Am. Inc.*

2018 WL 3648409 (D. Ariz. Aug. 1, 2018).....9

*FTC v. Fed. Loan Modification L. Ctr., LLP*

2009 WL 10675900 (C.D. Cal. Aug. 11, 2009) .....8

*FTC v. Hang-Ups Art Enterprises, Inc.*

1995 WL 914179 (C.D. Cal. Sept. 27, 1995) .....12

*FTC v. Moneymaker*

2011 WL 3290379 (D. Nev. July 28, 2011) .....6

*FTC v. N. Am. Mktg. & Assocs., LLC*

2012 WL 5034967 (D. Ariz. Oct. 18, 2012).....11

1	<i>FTC v. Noland</i>	
2	2020 WL 5632123 (D. Ariz. Sept. 21, 2020) .....	12
3	<i>FTC v. OMICS Grp. Inc.</i>	
4	2017 WL 6806802, (D. Nev. Dec. 15, 2017) .....	6
5	<i>FTC v. Sw. Sunsites, Inc.</i>	
6	1988 WL 94519 (C.D. Cal. Apr. 5, 1988) .....	12
7	<i>FTC v. Universal Premium Services, Inc.</i>	
8	2006 WL 8442141 (C.D. Cal. Sept. 19, 2006) .....	9, 10
9	<i>FTC v. Vemma Nutrition Co.</i>	
10	2016 WL 3548762 (D. Ariz. June 30, 2016) .....	7
11	<i>INS v. Hibi</i>	
12	414 U.S. 5 (1973) .....	5
13	<i>Moreno v. Corr. Healthcare Companies, Inc.</i>	
14	2019 WL 10733237 (E.D. Wash. Aug. 5, 2019) .....	8
15	<i>Operating Engineers' Pension Trust Fund v. Fife Rock Prods. Co.</i>	
16	2010 WL 2635782 (N.D. Cal. June 30, 2010) .....	7
17	<i>Pozez v. Ethanol Cap. Mgmt., LLC</i>	
18	2012 WL 12871197 (D. Ariz. Oct. 26, 2012) .....	8
19	<i>Rosen v. Masterpiece Mktg. Grp., LLC</i>	
20	222 F. Supp. 3d 793 (C.D. Cal. 2016) .....	10, 11
21	<i>SEC v. Nat'l Student Mktg. Corp.</i>	
22	59 F.R.D. 305 (D.D.C. 1973) .....	1, 12
23	<i>Tiller v. Atl. C. L. R. Co.</i>	
24	318 U.S. 54 (1943) .....	7
25	<i>United States v. Menatos</i>	
26	925 F.2d 333 (9th Cir. 1991) .....	6
27	<i>Watkins v. U.S. Army</i>	
28	875 F.2d 699 (9th Cir. 1989) .....	5, 6

**Rules**

Federal Rule of Civil Procedure 12(f) .....4

**Treatises**

Williston on Contracts § 7:11 (2008) .....7



## MEMORANDUM OF POINTS & AUTHORITIES

### **I. INTRODUCTION**

Plaintiffs Federal Trade Commission (“FTC”) and the California Department of Financial Protection and Innovation (together, “Plaintiffs”) submit this motion pursuant to Federal Rule of Civil Procedure 12(f) to strike affirmative defenses numbered 1-2, 4-12, and 14, and a crossclaim for equitable indemnification, asserted by Defendant Roger Scott Dyer (“Dyer”) in his Answer to Plaintiffs’ First Amended Complaint (“FAC”). The Court should strike these affirmative defenses and the crossclaim.

First, many of Dyer’s affirmative defenses are grounded in tort (e.g., assumption of risk, negligence) or contract (e.g., failure of consideration, fraud, illegality, payment, release, statute of frauds) and simply do not apply in this government enforcement action. Still others, while potentially applicable to litigation between private parties, generally cannot be asserted against the government agencies in this action.

Second, the affirmative defenses at issue are conclusory, insufficiently pled, and fail to give “fair notice” to the Plaintiffs, including the nature and the grounds of the affirmative defenses. For these reasons, Dyer’s affirmative defenses numbered 1-2, 4-12, and 14 should be stricken.

Third, Dyer’s crossclaim for equitable indemnification against his co-defendant Michael Robin Nabati (“Nabati”) should also be stricken. Courts have repeatedly rejected efforts by private litigants to tack on crossclaims against co-defendants or third parties in government enforcement actions due to the “delay, confusion, and complexity they introduce.” *SEC v. Nat’l Student Mktg. Corp.*, 59 F.R.D. 305, 307 (D.D.C. 1973).

///

///

///

1       **II.     FACTUAL BACKGROUND**

2           As set forth in greater detail in Plaintiffs’ *Ex Parte* Application for  
3 Temporary Restraining Order and the FAC, Defendants operate a mortgage  
4 assistance relief services scam. (Dkt. 9 at 2-6; Dkt. 43 at ¶¶ 19-57.) Defendants  
5 promise consumers that they can lower the interest rates and principal balances of  
6 their home mortgage loans. (*Id.*) In exchange, Defendants direct the consumer to  
7 make monthly payments to the Defendants for at least several months while  
8 Defendants purportedly “process” the consumer’s mortgage assistance relief  
9 application. (*Id.*) In reality, Defendants very rarely obtain any mortgage  
10 assistance relief for the consumer, and when they do, they do not obtain the interest  
11 rate and principal balance reduction originally promised. (*Id.*) Based on  
12 information received to date, Plaintiffs believe that Defendants’ conduct has  
13 harmed thousands of consumers and resulted in millions of dollars in ill-gotten  
14 gains for the Defendants and their associates. (Dkt. 9 at 6; Dkt. 43 at ¶ 3.)

15       **III.   PROCEDURAL HISTORY**

16           Plaintiffs filed this action on September 12, 2022, alleging that Defendants’  
17 mortgage assistance relief services scam violates federal and state laws. (Dkt. 1.)  
18 On September 14, 2022, the Court entered a temporary restraining order against  
19 Dyer and the other defendants named in the Complaint. (Dkt. 25.) On  
20 September 29, 2022, the Court entered a preliminary injunction against Dyer and  
21 the other Defendants named in the Complaint. (Dkt. 40.) On October 28, 2022,  
22 Plaintiffs filed the FAC, naming additional defendants, including Nabati.  
23 (Dkt. 43.)

24           On November 21, 2022, Dyer, through counsel, filed an Answer to the FAC  
25 (“Answer”). (Dkt. 63.) The Answer asserts fifteen affirmative defenses and  
26 asserts a crossclaim for equitable indemnification against Dyer’s co-defendant,  
27 Nabati.  
28

1 On December 1, 2022, counsel for Plaintiffs sent a detailed letter outlining  
2 why certain affirmative defenses and the crossclaim in Dyer's answer should be  
3 stricken. (Declaration of Taylor Steinbacher ("Steinbacher Decl."), at ¶ 3.) After  
4 meeting and conferring with counsel for the Plaintiffs, on December 8, 2022,  
5 counsel for Dyer submitted a stipulation to the Court in which Dyer would file an  
6 Amended Answer omitting certain affirmative defenses and the crossclaim. (*Id.*,  
7 ¶¶ 4-6; *see also* Dkt. 80.) However, on December 16, 2022, before the Amended  
8 Answer was filed, Dyer's counsel moved to withdraw; the Court granted that  
9 motion on December 21, 2022. (Dkts. 86, 95.)<sup>1</sup>

10 Also on December 21, 2022, the Court set a deadline of January 9, 2023, for  
11 Dyer, now appearing *pro se*, to file an Amended Answer. (Dkt. 97.) That date has  
12 now passed, and Dyer has not filed an Amended Answer—the affirmative defenses  
13 and crossclaim in Dyer's Answer still appear to be operative and should be stricken  
14 for the reasons stated herein.<sup>2</sup>

---

15  
16  
17 <sup>1</sup> On December 20, 2022, after the request to withdraw was filed but before it was  
18 granted, counsel for Plaintiffs e-mailed Dyer's former counsel asking if they would  
19 honor their past commitment to file an Amended Answer on Dyer's behalf.  
20 (Steinbacher Decl., ¶ 8.) Shortly after the Court granted Dyer's now-former  
21 counsel's request to withdraw, counsel for Plaintiffs followed up about this. (*Id.*,  
22 ¶ 11.) This correspondence went unanswered. (*Id.*)

23 <sup>2</sup> Notably, since becoming *pro se*, Dyer has not meaningfully participated in or  
24 defended himself in this action. For example, Dyer failed to respond to Plaintiffs'  
25 attempts to meet and confer regarding the filing of this motion. (Steinbacher Decl.,  
26 ¶¶ 12-13; 15.) Dyer failed to participate in the Rule 26(f) Conference or the  
27 drafting of the parties' Rule 26(f) Report. (*See* Joint Rule 26(f) Report (Dkt. 112)  
28 fn. 1.) Dyer has also failed to provide his Initial Disclosures to the parties, as  
required by Rule 26(a). (Steinbacher Decl., ¶ 18.) And several other  
communications to Dyer about this case have gone without reply. (Steinbacher  
Decl., ¶ 16.) Per the Court's Order Setting Scheduling Conference (Dkt. 78),  
Plaintiffs will request that the Court strike Dyer's Answer in its entirety and seek  
entry of his default if he does not begin to participate in this matter, forthwith.

1       **IV.   LEGAL STANDARD**

2       Rule 12(f) authorizes the Court to “strike from a pleading an insufficient  
3 defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.  
4 Civ. P. 12(f). While motions to strike are disfavored, especially when “ruling on  
5 such a motion will not significantly affect the scope of the litigation,” *CFPB v.*  
6 *Nationwide Biweekly Admin., Inc.*, No. 15-CV-02106, 2016 WL 2961868, at \*5  
7 (N.D. Cal. May 23, 2016), they are appropriate when “the motion may have the  
8 effect of making the trial of the action less complicated, or have the effect of  
9 otherwise streamlining the ultimate resolution of the action.” *California ex rel.*  
10 *State Lands Com. v. United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981). They  
11 “should be granted where the defenses to be stricken are insufficient as a matter of  
12 law, immaterial, in that they have no essential or important relationship to the  
13 claim for relief ... or are impertinent in that the matter consists of statements that  
14 do not pertain, and are not necessary, to the issues in question.” *FDIC v. Butcher*,  
15 660 F. Supp. 1274, 1277 (E.D. Tenn. 1987) (citations omitted).<sup>3</sup>

16       **V.   ARGUMENT**

17       **A.   Dyer’s Affirmative Defenses Nos. 1-2, 4-12, And 14 Are**  
18       **Inappropriate And Inapplicable**

19       Several of Dyer’s affirmative defenses are subject to strike because they are  
20 simply inappropriate for, and inapplicable to, this government enforcement action.

21  
22 \_\_\_\_\_  
23 <sup>3</sup> As noted above, Dyer has now missed the January 9, 2023, deadline to file his  
24 Amended Answer by several days. On January 13, 2023, Plaintiffs e-mailed Dyer  
25 to continue the meet and confer process that began with his previous counsel about  
26 the filing of the instant motion. (Steinbacher Decl., ¶ 15.) Pursuant to Local  
27 Rule 7-3, Plaintiffs have allowed seven days to pass with no response from Dyer  
28 before filing the instant motion. (*Id.*) Even assuming this motion is untimely—  
which Plaintiffs contend it is not in light of the unique circumstances here—the  
Court still retains the power to strike a pleading *sua sponte*. Fed. R. Civ.  
P. 12(f)(1) (stating that courts may strike a pleading “on its own”).

**1. Affirmative Defenses Nos. 4, 8, And 14 Are Generally Unavailable In Government Civil Enforcement Actions**

**Affirmative Defenses #4 and #14 - Waiver/Estoppel** – Waiver and estoppel are generally not available against a government agency in a civil suit to enforce a public right or to protect a public interest. *INS v. Hibi*, 414 U.S. 5, 8 (1973). While the Ninth Circuit has held that the government may be estopped in some limited circumstances, *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989) (en banc), it is well-settled that the government may not be estopped on the same terms as a private litigant. A party wishing to use traditional estoppel against the government must also establish: (1) affirmative misconduct going beyond mere negligence on the part of the government; and (2) that the government’s wrongful act will cause a serious injustice, and the public’s interest will not suffer undue damage by imposition of the liability. *Id.* at 707. No such showing has been made, or even alleged in the Answer, nor could one plausibly be made here. *See FTC v. OMICS Grp. Inc.*, 2017 WL 6806802, at \*3 (D. Nev. Dec. 15, 2017) (dismissing laches, waiver, and estoppel affirmative defenses).

**Affirmative Defense #8- Laches** – Similar to waiver and estoppel, the Ninth Circuit has repeatedly held that “[t]he government is not subject to the defense of laches when enforcing its rights.” *United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991) (superseded by statute on other grounds). As such, numerous courts have stricken laches defenses asserted in government enforcement actions as inappropriate. *FTC v. Moneymaker*, 2011 WL 3290379, at \*2 (D. Nev. July 28, 2011); *OMICS Grp.*, 2017 WL 6806802, at \*3 (dismissing laches affirmative defense); *FTC v. Com. Planet, Inc.*, 2010 WL 11673795, at \*3 (C.D. Cal. July 6, 2010) (same).

///

///

///

1                   **2. Affirmative Defense No. 6 Does Not Meet The Heightened**  
2                   **Pleading Requirements And Is Not Available In Government**  
3                   **Civil Enforcement Actions**

4                   **Affirmative Defense #6 - Fraud** – This affirmative defense should be  
5 stricken for two reasons. First, it fails to state with particularity the circumstances  
6 constituting the alleged fraud. *Operating Engineers’ Pension Trust Fund v. Fife*  
7 *Rock Prods. Co.*, 2010 WL 2635782, at \*4 (N.D. Cal. June 30, 2010) (“The Court  
8 agrees with plaintiffs that defendants ‘must state with particularity the  
9 circumstances constituting fraud’ and that defendants have not done so.”) (citations  
10 omitted). Second, to the extent that this affirmative defense is seeking to shift  
11 liability to a third party, that would be impermissible in this public interest  
12 enforcement action. *See FTC v. Am. Evoice, Ltd.*, 2016 WL 7165904, at \*3 (D.  
13 Mont. Aug. 9, 2016) (“[I]t is unlikely [defendant] could transfer his liability in a  
14 federal civil enforcement action to third-parties—to the extent the FTC’s claims  
15 sound in fraud and deceptive practices, [defendant] would not be entitled to  
16 indemnification.”).

17                   **3. Affirmative Defenses Nos. 1-2 Are Grounded In Tort And This**  
18                   **Is Not A Tort Case**

19                   **Affirmative Defense #1 - Assumption of Risk** – Assumption of the risk is a  
20 defense sounding in tort. *See Tiller v. Atl. C. L. R. Co.*, 318 U.S. 54, 58–61 (1943)  
21 (analyzing the assumption of risk defense against the master-servant tort doctrine).  
22 But this is not a tort case. Furthermore, there is no plausible set of facts in which  
23 the Dyer can argue that the government agencies bringing this case assumed any  
24 risk that would mitigate his liability. Accordingly, this affirmative defense should  
25 be stricken. *FTC v. Vemma Nutrition Co.*, 2016 WL 3548762, at \*2 (D. Ariz.  
26 June 30, 2016) (striking affirmative defense of assumption of risk).

27                   **Affirmative Defense #2 - Contributory or Comparative Negligence** –  
28 Contributory and comparative negligence are affirmative defenses sounding in tort.

1 *See, e.g., Moreno v. Corr. Healthcare Companies, Inc.*, 2019 WL 10733237, at \*2  
2 (E.D. Wash. Aug. 5, 2019) (affirmative defenses of comparative fault and  
3 contributory negligence are based in tort). But this is not a tort action. Moreover,  
4 affirmative defenses asserting the fault of others that do not identify the factual  
5 basis for the defense should be stricken. *FTC v. Fed. Loan Modification L. Ctr.,*  
6 *LLP*, 2009 WL 10675900, at \*1 (C.D. Cal. Aug. 11, 2009) (striking affirmative  
7 defense of “fault of others” where defendants “make only a vague reference to the  
8 conduct, fault, and negligence of other persons or entities”). And there is no  
9 plausible set of facts in which Dyer can argue that the government agencies  
10 bringing this case were contributorily or comparatively negligent. Accordingly,  
11 this affirmative defense should be stricken.

12 **4. Affirmative Defenses Nos. 5, 7, 9-10, And 12 Are Grounded In**  
13 **Contract And This Is Not A Contract Case**

14 **Affirmative Defense #5 - Failure of Consideration** – “A failure of  
15 consideration occurs when there is a valid contract, but due to some reason, one  
16 party fails to perform their responsibilities under the contract.” *Pozez v. Ethanol*  
17 *Cap. Mgmt., LLC*, 2012 WL 12871197, at \*1 (D. Ariz. Oct. 26, 2012) (citing  
18 Williston on Contracts § 7:11 (2008)). Here, the FAC does not allege that  
19 defendants breached a contract with the Plaintiffs such that this affirmative  
20 defense would be applicable. And Dyer does not identify any particular contract  
21 for which Plaintiffs have failed to provide the required consideration.  
22 Accordingly, this affirmative defense should be stricken. *See FTC v. Elec.*  
23 *Payment Sols. of Am. Inc.*, 2018 WL 3648409, at \*7 (D. Ariz. Aug. 1, 2018)  
24 (striking failure of consideration defense after defendant did not respond to  
25 motion to strike).

26 **Affirmative Defense # 7 - Illegality** – This affirmative defense claims that  
27 Dyer’s “performance under [his] contracts became illegal to perform; thus [he]  
28 should be excused from further performance.” But as with the affirmative



1 defenses of payment and release, below, this affirmative defense is subject to  
2 strike because this is not a contract case. Moreover, Plaintiffs' claims in this case  
3 are totally independent of any contractual claims that could be applicable to the  
4 customers that were defrauded. *See FTC v. Universal Premium Services, Inc.*,  
5 2006 WL 8442141, at \*2-3 (C.D. Cal. Sept. 19, 2006). And Dyer's Answer does  
6 not identify what specific contract he should be excused from performing, or why  
7 this defense has any relevance to this government enforcement action brought in  
8 the public's interest. Accordingly, this affirmative defense should be stricken.

9 **Affirmative Defenses #9 and #10 – Payment and Release** – The  
10 affirmative defenses of payment and release are subject to strike. As stated above,  
11 this is not a contract case; Plaintiffs' claims are totally independent of any  
12 contractual claims that could be applicable to the customers that were defrauded as  
13 part of the Defendants' scheme. *See Universal Premium Servs.*, 2006 WL  
14 8442141, at \*2-3 (striking claims for payment and release).

15 **Affirmative Defense #12 - Statute of Frauds** – This affirmative defense  
16 claims that the "Statute of Frauds" bars the plaintiff agencies from bringing this  
17 complaint but sets forth no other facts demonstrating how the statute of frauds  
18 could apply. Defenses that are mere recitations of legal doctrines devoid of any  
19 factual allegations do not provide fair notice and are subject to strike. *Rosen v.*  
20 *Masterpiece Mktg. Grp.*, LLC, 222 F. Supp. 3d 793, 804-805 (C.D. Cal. 2016) at  
21 804–05. Moreover, as previously discussed, this is not a contract action for which  
22 the Statute of Frauds could possibly apply.

23 **5. Affirmative Defense No. 11 Must Be Stricken Because No**  
24 **Applicable Judgments Exist**

25 **Affirmative Defense #11 - Res Judicata** – Res judicata bars relitigation of  
26 the same cause of action between the same parties where there is a prior judgment.  
27 *Allen v. McCurry*, 449 U.S. 90 (1980). Thus, this affirmative defense turns on  
28 whether the plaintiffs brought suit or attained judgment against any of the



1 defendants. *Universal Premium Servs.*, 2006 WL 8442141, at \*4-5. Dyer  
2 identifies no such lawsuits or judgments against him, and Plaintiffs are unaware of  
3 any such prior lawsuits involving the same claims and parties. Accordingly, this  
4 affirmative defense should be stricken. *See id.* (striking res judicata affirmative  
5 defense).

6 In sum, Plaintiffs request the Court strike Dyer's affirmative defenses  
7 numbered 1-2, 4-12, and 14 as inappropriate for, and inapplicable to, this  
8 government enforcement action.

9 **B. Dyer's Affirmative Defenses Nos. 1-2, 4-12, and 14 Are Also**  
10 **Subject To Strike As Inadequately Pled**

11 As discussed above, Dyer's affirmative defenses are conclusory and are  
12 insufficiently pled. Defendants pleading affirmative defenses must provide "fair  
13 notice" of the affirmative defense, which "requires that the defendant state the  
14 nature and grounds for the affirmative defense." *FTC v. N. Am. Mktg. & Assocs.,*  
15 *LLC*, 2012 WL 5034967, at \*1 (D. Ariz. Oct. 18, 2012) (citations omitted). In the  
16 absence of such fair notice pleading, it is impossible for Plaintiffs to evaluate or  
17 respond appropriately to Dyer's assertions. Thus, Dyer's failure to plead any facts  
18 or grounds in support of these defenses is reason alone to strike them. *See Rosen at*  
19 *804-805* ("Standing alone, these defenses are mere recitations of legal doctrines  
20 devoid of any factual allegations, and as such, they fail to provide 'fair notice' to  
21 Plaintiff."); *N. Am. Mktg.*, 2012 WL 5034967, at \*1 (striking affirmative defenses  
22 that "contain no reference to supporting facts . . . and thus provide no notice  
23 concerning the basis of the defenses.").

24 **C. Dyer's Crossclaim For Equitable Indemnification Against His Co-**  
25 **Defendant Nabati Is Inappropriate Here**

26 Dyer also asserts a crossclaim against his co-defendant Nabati for equitable  
27 indemnification. Dyer's Answer alleges that, among other things, he worked under  
28 Nabati's direction and control and that Nabati hired him to file complaints against

1 mortgage companies. (Answer at ¶¶ 136-37.) Because of this, Dyer claims that  
2 Nabati is liable to him for all the claims asserted by the Plaintiffs in this action.  
3 (*Id.* at ¶ 143.)

4 But courts have repeatedly rejected attempts by defendants to interpose  
5 crossclaims or third-party claims like Dyer’s in government enforcement actions  
6 such as this. “Where suit is brought by the government to enforce the law, public  
7 [] policy militates against the pendency of private claims and the concomitant  
8 delay, confusion and complexity they introduce.” *SEC v. Nat’l Student Mktg.*  
9 *Corp.* at 307; see also *FTC v. Noland*, 2020 WL 5632123, at \*4 (D. Ariz. Sept. 21,  
10 2020) (noting that there is an unbroken line of cases stating that the Rule 19(a)  
11 joinder rules cannot “be invoked by a defendant in an enforcement proceeding  
12 brought by an administrative agency” such as the FTC). More specifically, courts  
13 have rejected indemnification theories in enforcement cases brought by the FTC.  
14 “Defendants cannot indemnify themselves or seek contribution in a fraud case  
15 brought by the FTC . . . and permitting the defendants to prosecute their own  
16 private claims alongside the FTC would unnecessarily complicate and delay  
17 fulfillment of the agency’s role.” *FTC v. Adept Mgmt., Inc.*, 2017 WL 1055959,  
18 at \*4 (D. Or. Mar. 20, 2017); see also *FTC v. Sw. Sunsites, Inc.*, 1988 WL 94519,  
19 at \*3 (C.D. Cal. Apr. 5, 1988) (rejecting contribution claim against third-party in  
20 FTC consumer redress action). As one court has recognized, allowing crossclaims  
21 for indemnity would “decimate the FTC’s ability to obtain consent orders if the  
22 offending party could also be subject to an indemnity claim.” *FTC v. Hang-Ups*  
23 *Art Enterprises, Inc.*, 1995 WL 914179, at \*2 (C.D. Cal. Sept. 27, 1995) (agreeing  
24 with reasoning of *Southwest Sunsites* and rejecting an indemnity crossclaim under  
25 the same reasoning). And as discussed above, courts have also rejected attempts  
26 by defendants to transfer their liability in government enforcement cases to third  
27 parties. See *Am. Evoice, Ltd.*, 2016 WL 7165904, at \*3.

1 The reasoning behind these cases is equally applicable here. Allowing Dyer  
2 to assert a crossclaim against Nabati here would unnecessarily complicate this  
3 matter and potentially delay, or even prevent, the provision of much-needed  
4 consumer redress.<sup>4</sup>

5 Accordingly, the Court should strike the crossclaim asserted by Dyer against  
6 Nabati in his Answer.

7 **VI. CONCLUSION**

8 For the reasons stated above, Plaintiffs respectfully request that the Court  
9 strike affirmative defenses numbered 1-2, 4-12, and 14, and the crossclaim for  
10 equitable indemnification, from Dyer's Answer.

11 Dated: January 20, 2023

Respectfully submitted,

12 /s/ Karina A. Layugan

13 MILES D. FREEMAN

14 mfreeman@ftc.gov

15 KARINA A. LAYUGAN

16 klayugan@ftc.gov

17 CARLA L. CHEUNG

18 ccheung1@ftc.gov

19 Federal Trade Commission

20 10990 Wilshire Boulevard, Suite 400

21 Los Angeles, CA 90024

22 Tel: (310) 824-4300

23 Fax: (310) 824-4380

24 *Attorneys for Plaintiff Federal Trade*  
25 *Commission*

/s/ Taylor Steinbacher

TAYLOR STEINBACHER

Taylor.Steinbacher@dfpi.ca.gov

LOUIS LAVERONE

Louis.Laverone@dfpi.ca.gov

California Department of Financial

Protection & Innovation

320 West 4th Street, Suite 750

Los Angeles, CA 90013

Tel: (213) 576-7500

Fax: (213) 576-7181

*Attorneys for Plaintiff California*  
*Department of Financial Protection &*  
*Innovation*

26 <sup>4</sup>Notably, Nabati's Answer also asserts two crossclaims against Dyer: (1) for  
27 violation of Penal Code sections 632 and 637.2; and (2) for equitable indemnity—  
28 Nabati has demanded a jury trial on these issues. (See Dkt. 107.) Plaintiffs are  
currently meeting and conferring with counsel for Nabati regarding, among other  
things, their contention that this crossclaim should also be stricken. (See Dkt. 121.)

**FILER'S ATTESTATION OF CONCURRENCE**

Pursuant to Local Rule 5-4.3.4(a)(2), I, Taylor Steinbacher, attest that all other signatories concur in the content of the foregoing document and authorize its filing.

Dated: January 20, 2023

Respectfully submitted,

/s/ Taylor Steinbacher

TAYLOR STEINBACHER

California Department of Financial  
Protection & Innovation

320 West 4th Street, Suite 750

Los Angeles, CA 90013

Tel: (213) 576-7500

Fax: (213) 576-7181

*Attorneys for Plaintiff California  
Department of Financial Protection &  
Innovation*